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IN THE

Supreme Court of the United States.

SANITARY REFRIGERATOR CO.,
Petitioner,
vs.
ALEXANDER F. WINTERS and
BASIL R. CRAMPTON,
Respondents.

October Term, 1927.
No. 128

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

E. HAYWARD FAIRBANKS,
Philadelphia, Pa.,
HERBERT J. JACOBI,
Washington, D. C.,
Counsel for Petitioner.

J. D. MILANS & SONS, 707 EIGHTH STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI.

SANITARY REFRIGERATOR CO.,
Petitioner,
vs.
ALEXANDER F. WINTERS and
BASIL R. CRAMPTON,
Respondents.

October Term, 1927.
No. 128.

Now comes Sanitary Refrigerator Co., the above-named petitioner, by its attorneys and counsellors, and petitions this Honorable Court for a Rehearing of its Petition for a writ of certiorari directed to the Honorable, the Judges of the United States Circuit Court of Appeals, within and for the Seventh Judicial Circuit, commanding them forthwith to certify and return to this Court all proceedings had by them in the suit lately before them, wherein petitioner was appellant and said Alexander F. Winters and Basil R. Crampton were appellees.

The grounds for this Petition for Rehearing are as follows:

1. Since the filing of the Petition for a writ of certiorari, there has been received the opinion of the United States Circuit Court of Appeals for the Third Circuit in the case of Winters and Crampton, appellants, vs.

Dent Hardware Company, appellee, No. 3727, October Term, 1927, filed October 4, 1928.

2. The opinion of the United States Circuit Court of Appeals for the Third Circuit, of which copies are herewith attached, is in conflict with the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, of which opinion copies are also herewith attached.

3. The same patent in suit and the same issue of infringement was before both Circuit Courts of Appeal.

4. The only ground for opposition to the original Petition was that the case before the Court of Appeals for the Third Circuit had not been finally determined and this ground for opposition is removed by the filing of the conflicting opinion of the aforesaid Court of Appeals for the Third Circuit.

5. There is now before this Honorable Court copies of diverse opinions between two Circuit Courts of Appeal on the same patent in suit and on the same issue of infringement.

6. The seeming violation by the Court of Appeals for the Seventh Circuit of the decisions of this Honorable Court as to the scope to be given the claims of respondents' narrow, limited, secondary patent render the grant of the writ of certiorari peculiarly proper in the interest of substantial justice and for final settlement of what scope is to be given claims 1, 2, 3, 4 and 7 of the Winters and Crampton patent for the remainder of its term throughout the United States and the Territories thereof.

Respectfully,

E. Hayward Fairbanks,

Herbert J. Jacobi,

Counsel for Petitioner.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING.

This is a Petition for Rehearing of a Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. When the original Petition for this writ of certiorari was filed with this Honorable Court, there was of record the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Winters and Crampton vs. Sanitary Refrigerator Co., 24 Fed. (2d) 15, holding the Winters and Crampton patent in suit, No. 1,384,102, valid and infringed. There was also of record the decision of Judge Dickinson of the United States District Court for the Eastern District of Pennsylvania, in the case of Winters & Crampton vs. Dent Hardware Company, 20 Fed. (2d) 671, on the same issue of infringement, holding that the same patent was not infringed. The only opposition by respondents was based on the ground that at the time the original Petition for writ of certiorari was filed, the case in the Court of Appeals for the Third Circuit had not been finally determined and that there was at that time no conflict of opinion between two different Circuit Courts of Appeal.

On October 4, 1928, Judge Dickinson's opinion was affirmed by the Circuit Court of Appeals for the Third Circuit. Copies of the opinion of the Circuit Court of Appeals for the Third Circuit are herewith attached together with copies of the opinion of the Circuit Court of Appeals for the Seventh Circuit, and it will be readily observed that the same patent in suit and the same issue of infringement was before both of said Circuit Courts of Appeal.

There is, therefore, a diversity of opinion between the Circuit Court of Appeals for the Seventh Circuit and the Circuit Court of Appeals for the Third Cir-

cuit on the same patent in suit and on the same issue of infringement.

Your petitioner, therefore, shows that said decisions or adjudications of the two Circuit Courts of Appeal are at variance and in conflict with each other and the errors of the one or the other may only be authoritatively corrected in this Honorable Court.

Wherefore, your petitioner prays that this Honorable Court take cognizance of the matters herein set forth or referred to and grant unto your petitioner a rehearing of its original Petition and further grant unto your petitioner a writ of certiorari, requiring said cause and the record thereof to be certified to this Court by the United States Circuit Court of Appeals for the Seventh Circuit for review and determination herein, pursuant to the provision of the statute in such cases made and provided; and that your petitioner may have such other and further relief in the premises as the nature and circumstances of its case may require.

And your petitioner will ever pray, etc.

SANITARY REFRIGERATOR CO.,
By E. HAYWARD FAIRBANKS,
HERBERT J. JACOBI,
Counsel for Petitioner.

We hereby certify that the foregoing stated grounds in support of the Petition for Rehearing of the Petition for writ of certiorari in the above-entitled cause are, in our opinion, well founded in point of law.

E. HAYWARD FAIRBANKS,
HERBERT J. JACOBI,
Counsel of Petitioner.

Copy of this Petition has been served on counsel for respondents by registered mail, October 11th, 1928.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 3727. October Term, 1927.

ALEXANDER F. WINTERS AND BASIL R. CRAMPTON,

Appellants,

v.

DENT HARDWARE COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PENNSYLVANIA.

(Filed October 4, 1928.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges.*

DAVIS, *Circuit Judge.*

This is an appeal from a decree of the District Court dismissing the bill of complaint charging the defendant with infringing United States Letters Patent No. 1,385,102 issued to Alexander F. Winters and Basil R. Crampton July 19, 1921. All seven of the claims were alleged to have been infringed. The Court held claims 1, 2, 3, 4, and 7 to be valid but not infringed and claims 5 and 6, which plaintiffs sought to withdraw, invalid.

The appellants brought suit against the Sanitary Refrigerator Company for the infringement of the patent in question in the United States District Court for

the Eastern District of Wisconsin. That court held all seven claims valid and infringed. An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. There, the patentees conceded that claims 5 and 6 were invalid and the appellee here concedes that the other claims are valid if limited to the specific structure disclosed, and when so limited, it says it does not infringe.

Claims 1 and 7 are typical. They disclose in combination a door, a casing or joint, a keeper attached to the casing and a latch lever attached to the door rather than to the casing.

The patentees proceeded upon the assumption that latch levers of this general type in the prior art were all attached to the casing and that one of the novel disclosures in their patent was the transposition of the latch from the casing to the door and the keeper from the door to the casing. They say in their specifications:

> "The swinging lever latch, or as it is better known, the Condit latch, is pivotally connected at one end to the door jamb or casing, allowing the door to be opened when the latch is thrown to an upper vertical position, and coming down across the meeting edges of the casing and door when swung to horizontal position, engaging with a cam member on the door to wedge the door tightly shut. This latch is a very serviceable latch but is relatively hard to operate due to its attachment to the casing instead of the door, and the same is liable to drop to horizontal position in which case the door cannot be closed without first raising the lever to upper vertical position while, many times, the door is inadvertently swung toward closed position and against the lever in its horizontal position with injury either to the lever or door or both.

In the present invention, it is a primary object and purpose to provide a latch which may be pivotally connected to the door and which is automatically operated to engage with a retaining member or keeper fixed on the door casing when the door is closed irrespective of the vertical or horizontal position of the latch lever, working as well in the one case as the other. . . . The mounting of the lever on the door is of value as use of one hand only is necessary for unlatching and drawing the the door open. The ability to close the door and latch it automatically, irrespective of the position of the latch lever insures against injury to the latch or door and also insures that the door will be latched when it is swung shut."

The patents, however, to Keil, No. 564,448; to Dent, No. 67,506; to Schrader, Nos. 1,117,709 and 1,170,685 and to Ward, No. 1,250,736 show latches on the door and keepers on the casing. So there is nothing new in the transposition by the patentees of the latch from the casing to the door. Neither is there anything new or novel in the door or casing as such. Patentable novelty, therefore, must be found, if at all, in the particular form or function of the keeper or latch or in both.

The keeper in the Keil patent is strikingly similar in both form and function to that of the patent in suit. In Keil, the keeper has a base attached to the casing by three screws. From this base a post extends outwardly for a short distance and terminates in a triangular head, which on the under side extends downwardly for a distance below the lower edge of the post. The head of the latch is the apex of the triangle. The two sides terminating in the head are practically straight while those of the patent in question are somewhat curved. From the apex of the keeper, when at-

tached to the casing, one of the triangular sides extends upwardly and the other downwardly. The inner or lower side is cut upwardly and somewhat inwardly at a slight angle to the vertical, forming a wedging cam. This meagre description reads equally well on the keeper of either the Keil patent or the patent in suit.

The function of every part of the Keil keeper is practically identical with that of the keeper of the patent in question. One or the other of the arms of the latch lever of the Keil latch slides down on the lower triangular side of the keeper when the door is being closed. Which one of these two arms contacts with this lower side depends upon the position in which the latch lever is when the door is closed. The function performed by the plaintiffs' keeper and the Keil keeper in cooperation with the latch levers is the same function performed by keepers generally in the prior art patents. Only one of the sides of the Keil keeper, however, engages the arms of the latch lever and serves as a cam to direct the lever when the door is closed, but this is due to the design of the arms of the levers and not to difference in principle of operation.

The next question concerns the latch lever. Judge Evans in construing this patent in the Circuit Court of Appeals for the Seventh Circuit said that, "patentable novelty resides in the structural differences of the latches (either in the keeper member or latch member or both)." The latch lever of the patent is about four inches long. A pin is run through the lever about one inch from the end which engages the keeper. This serves as a pivot or fulcrum. This latch lever is really a handle having two right angled arms near the pivot. One is the extension of handle beyond the pivot and the other is at right angles to it. In operation one of these two arms "is engaged with an outer portion of

the keeper when the door is moved to closing position to swing the lever from a vertical position to a horizontal and engage the other arm under the keeper, and the other (arm) of which is engaged with a different outer portion of the keeper when the door is moved to closing position and the lever is horizontal to run the lever upwardly toward vertical position or until said other arm passes under and engages with the keeper to hold the door closed." These general features and functions of latch levers were old in the art.

The lever in the Keil patent has the general features of the plaintiffs' lever. It will lock when the door is closed whether the lever is in a horizontal, vertical or an intermediate position, because of the cooperation of the two arms 4 and 5 of the lever latch with the keeper "to force the door tightly to" when it is shut. The keeper is mounted on the door casing just as in the patent in suit. The latch lever is pivotally mounted between its ends on the door. One of the ends forms the operating handle and the other contains two arms one or the other of which engages the cam on the keeper when the door is closed.

The elements common to the devices of Keil and the plaintiffs are: a door, a casing, a keeper attached to the casing, a lever latch pivotally attached to the door, means on the keeper to engage the arms of the latch and means on the latch to engage with the keeper. The two arms of the engaging end of the Keil lever, however, are in the same parallel plane while the two arms on the plaintiffs' lever are at right angles, but both perform the same function, and this difference is one of design and not of principle of operation.

The Charles Patent, No. 702,185, issued June 10, 1902, shows a device having a latch lever corresponding in its essential features with the plaintiffs'. It has

a handle portion which may stand in a horizontal, vertical or intermediate position. There are two arms on the other end, one extending beyond the pivot or fulcrum and the other substantially at right angles to it. The function of these arms, coacting with the keeper, is to fasten the door when it is shut and to hold it in a closed position. This latch considered as a design structure is somewhat different from the plaintiffs', but functionally both are substantially the same.

The function of the arms generally is to trip, or give a kick to the latch lever by the coaction of the arms with the keeper when the door is closed. The object of all these tripping devices, which are numerous and old in the art, is to fasten the door and hold it a closed position regardless of the position of the lever when the closing operation begins.

The art was crowded with latches that automatically lock when the door is closed when this patent to Winters and Crampton was issued. In addition to the patents to Keil and Charles, there are patents involving the same general features and functions to Dent, No. 670,506 (1900); to Schrader, No. 1,117,709 (1914), No 1,170,685 (1915), No. 1,265,120 (1917); and to Ward, No. 1,250,736. In speaking for the Circuit Court of Appeals for the Seventh Circuit, Judge Evans said of the plaintiffs' patent:

> "Whether the other claims (than 5 and 6 admitted to be invalid) are infringed depends entirely upon the position of the patent in suit in the art. No difficulty would be experienced in finding infringement if the patent were a pioneer or was one covering such an improvement as entitled it to a broad range of equivalency. But the patent does not occupy any such position. It is an extremely narrow one as a reading of the claims

at once discloses. Moreover, the record shows a prior art loaded with latches possessing some of the features of appellee's latch . . . Patentable novelty, if any exists, is restricted to the particular structure disclosed . . . The precise question then is, does appellant avoid infringement by placing a lug on the near side of the head of its keeper, the surface of which is curved similarly to the outer surface of its head and which is adapted to contract with the arm projecting from the handle portion of its lever? Concede the existence of claims that are narrow and restricted to structural design only, yet even in such claims there must be some range of equivalency."

Counsel sought to withdraw claims 5 and 6, but Judge Dickinson declared them to be invalid. We have grave doubt as to the validity of the other claims, but if they are valid, their scope is clearly confined to the structural design disclosed.

The question then arises, does the defendant's device infringe the structural design which plaintiffs' patent discloses?

The defendant's device has a keeper attached to the casing of the door and a latch attached to the door, but they are quite different in design from the plaintiffs'. The defendant's keeper is old. It has an outstanding post and a head depending below the post and with upper and lower curved outer sides coming substantially to a point, but it has a lug on the near side of the triangular head. The plaintiffs' keeper does not have this.

The latch of the defendant has one arm formed with an under cam side extending from the pivot and adapted to be engaged under the depending portion of the keeper, but its other arm is entirely unlike it in form. The arm contacts with the lug on the keeper

and this causes the lever to swing and lock when the door is closed. The upper triangular side of this keeper performs no function when the door is closed. For anything that it does, it might as well not be there. It does not coact at all with the latch, but the same side in the plaintiffs' does.

Both the design and function of the defendant's latch and keeper are unlike those of the plaintiffs'. They cannot be said to infringe unless they come within the narrow range of equivalency of a design patent entering a crowded art. Structural design claims have some "range of equivalency," but that range must be as narrow as the invention itself. Is the lug outstanding from the head of defendant's keeper equivalent to the upper triangular side of the plaintiffs' keeper? It certainly is not in structure. It performs a similar function just as do the sides of many keepers of the prior art. Neither does defendant's latch have any arm corresponding in design to the upper arm of plaintiffs' latch. If the patent in suit were a pioneer patent and originated the trip or kick that locks the door when it is closed, then the defendant's device might infringe. The patent would be entitled to a broad construction and wide range of equivalency. But it came into an already crowded art with many patents having various devices involving arms, cams, lugs, projections, protuberances and all sorts of contrivances for holding the door in a closed position when it was shut.

The same range of equivalency here contended for by the plaintiffs, so as to include the defendant's structure, would bring plaintiffs' patent within the prior art and invalidate it. It seems to us that the choice lies between holding the plaintiffs' patent invalid for want of patentable novelty over the prior art or hold-

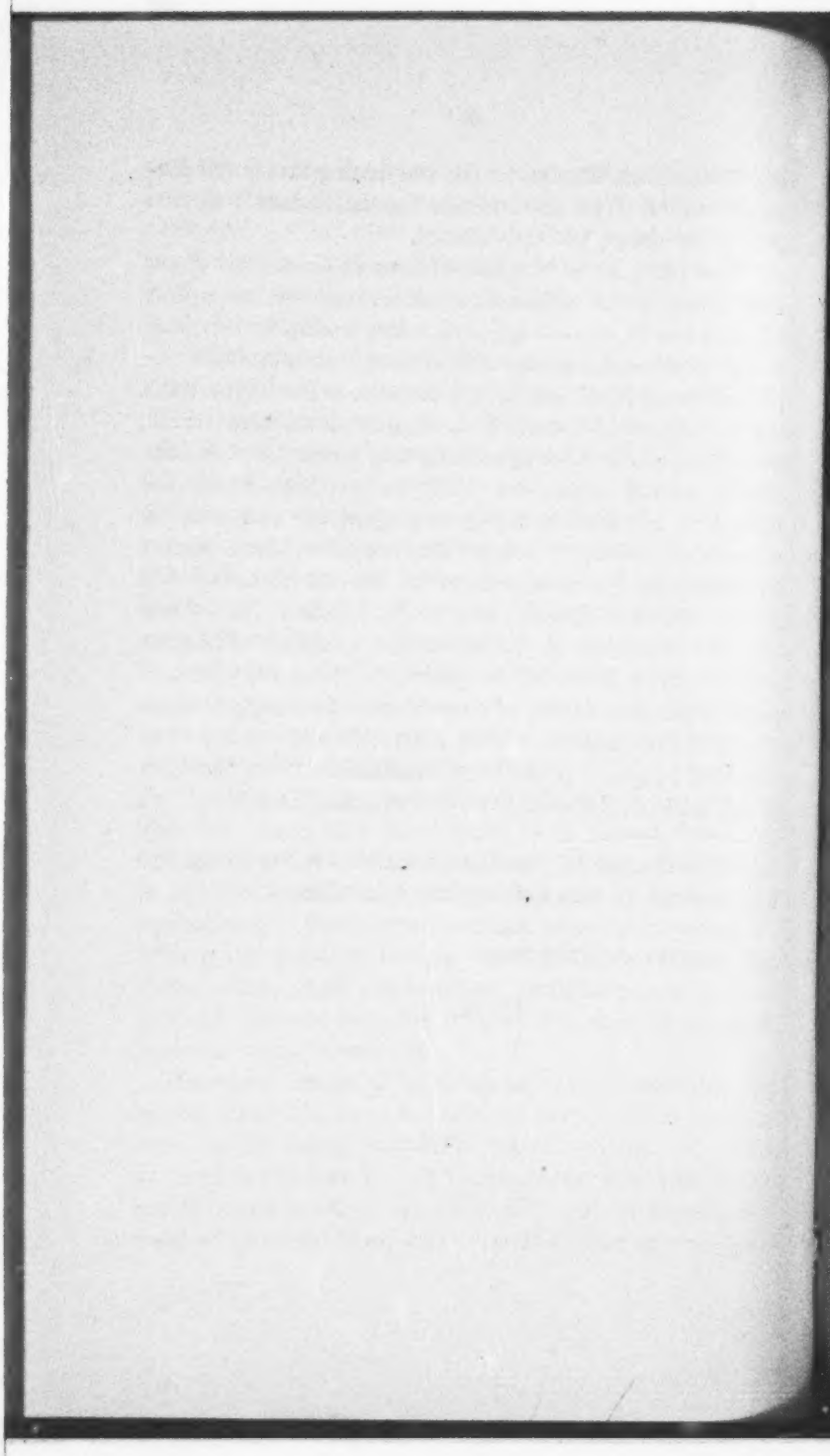
ing it valid but limited to the particular structure disclosed which does not include the defendant's device within its range of equivalency.

The purpose of the patent laws is to reward those who make some substantial discovery or invention which adds to knowledge and takes a step in advance in the procession of the useful arts. It is not the object of those laws to grant a monopoly for every trifling device, every shadow or shade of an idea which would naturally and spontaneously occur to any mechanic skilled in the art. The patent laws never intended to lay such a heavy tax upon the industry of the country without seeing that some real contribution was made to the advancement of the useful arts. Atlantic Works v. Brady, 107 U. S. 192,200. We think that the structure of the defendant's latch and keeper are so unlike those of the plaintiffs' that they do not come within the range of equivalency necessary to constitute infringement. With great respect we are constrained to reach a different conclusion from the Circuit Court of Appeals for the Seventh Circuit.

The decree of the District Court dismissing the bill because of non-infringement is affirmed.

Attest: A truly copy.

Clerk.



IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1927, JANUARY SESSION, 1928

No. 3935

SANITARY REFRIGERATOR COMPANY, Appellant,

vs.

ALEXANDER F. WINTERS and BASIL R. CRAMPTON, Appellees

Appeal from the District Court of the United States for the Eastern District of Wisconsin

Before Alschuler, Evans, and Page, Circuit Judges

February 9, 1928.

EVANS, C. J.:

A patent, No. 1,385,102, to Winters and Crampton issued July 19, 1921, covering a latch, was the basis of the instant suit. Seven claims are involved, two of which (5th and 6th) are broad, generic claims, while the other five (1, 2, 3, 4, and 7) are narrow, specific claims.

The District Court sustained all claims and found appellant to be an infringer thereof. Thereafter appellees brought suit upon this same patent in the District Court for the eastern district of Pennsylvania and the court there held that claims five and six of the patent were invalid and the other five claims were not infringed by latches similar to the ones made by appellant.

Counsel, with commendable frankness, have made concessions in this court which greatly narrow the controverted issues. Appellant admits the validity of claims 1, 2, 3, 4, and 7, while appellees concede that claims 5 and 6 are invalid. The sole issue remaining,

in view of these concessions, is one of infringement of the five valid claims. The concession that these five claims are valid was accompanied by the statement that validity was recognized only in view of an asserted construction which gave to each claim so narrow a field that infringement was not disclosed.

The inventor said:

"This invention relates to a latch of the swinging lever type, particularly adapted for use on refrigerators though applicable in many other relations where a door is to be closed and held in closed position. The swinging lever latch, or as it is better known, the Condit latch, is pivotally connected at one end to the door jamb or casing, allowing the door to be opened when the latch is thrown to an upper vertical position, and coming down across the meeting edges of the casing and door when swung to horizontal position, engaging with a cam member on the door to wedge the door tightly shut. This latch is a very serviceable latch but is relatively hard to operate due to its attachment to the casing instead of the door, and the same is liable to drop to horizontal position, in which case the door cannot be closed without first raising the lever to upper vertical position while, many times, the door is inadvertently swung toward closed position and against the lever in its horizontal position with injury either to the lever or door or both. In the present invention, it is a primary object and purpose to provide a latch which may be pivotally connected to the door and which is automatically operated to engage with a retaining member or keeper fixed on the door casing when the door is closed irrespective of the vertical or horizontal position of the latch lever, working as well in the one case as the other. A further object of the invention is to construct a latch of few parts, whereby it may be economically made and which will be durable and efficient in service."

Two typical claims are one and seven, herewith quoted:

1. "In combination, a door and casing therefor, a keeper attached to the casing comprising a base, an outstanding post and a head at the outer portion of the post, said head depending below the post and formed with upper and lower curved outer sides coming substantially to a point and with an inner upwardly and inclined side, a member attached to the door comprising a base, an integral outstanding post projecting from the base and a laterally extending arm at the upper end of the post paralleling the base, and a latch lever pivotally mounted between its ends between the said arm and base of said member, said lever having one arm formed with an under cam side extending from the pivot and adapted to be engaged under the depending portion of the keeper, a handle portion extending in the opposite direction from the pivot and another arm projecting from the handle portion a distance from the pivot and lying substantially at right angles to the first arm of the lever and likewise being formed with an inner cam side, substantially as and for the purposes described.

7. "In combination, a door and a casing therefor, a keeper attached to the casing, a latch lever pivotally mounted on the door between its ends, one end of the lever being formed into an operating handle and the other into a keeper engaging arm, a second arm projecting from the handle portion of the lever a short distance from its pivot and at an angle to the first arm, said keeper being formed at its outer sides for engagement with the respective arms when the lever is in horizontal and vertical positions, respectively, as the door is closed, to automatically operate the lever so that it will engage under the keeper when the door is entirely closed, substantially as described."

While appellee conceded that claims five and six were invalid in view of the prior art, we would have no hesitancy in so finding in the absence of this admission.

Whether the other claims are infringed depends entirely upon the position of the patent in suit in the art. No difficulty would be experienced in finding infringe-

ment if the patent were a pioneer or was one covering such an improvement as entitled it to a broad range of equivalency. But the patent does not occupy any such position. It is an exteremely narrow one as a reading of the claims at once discloses. Moreover, the record shows a prior art loaded with latches possessing some of the features of appellee's latch.

Describing appellee's latch, counsel say:

"The latch is attached to the door of the refrigerator and the keeper for the latch is attached to the door jam. * * * The swinging latch of the patent in suit is an automatic latch acting to close and tightly close when the door is moved to shut it irrespective of the position the latch lever may have whether horizontal or level."

The prior art as disclosed by the Kiel patent No. 564,448, the Dent patent No. 67,506, and Charles patent No. 702,185, the Schrader patents Nos. 1,117,709 and 1,170,685, the War patent No. 1,250,736, all refute the contention of asserted novelty, in the location of the keeper upon the door jam and the lever upon the door or in providing for the automatic closing of the door without regard to the position of the lever. It may be true that in some of these disclosures because of the law of gravity the lever invariably takes but one position.

In the Dent patent the keeper was attached to the casing while the member carrying the latch lever was attached to the door. In the Charles latch the keeper was on the door while the other member was on the casing. The Kiel latch had its keeper on the casing and the latch member on the door. Each structure, examples of which are in evidence, works automatically when the door is slammed shut whether the latch lever is in a horizontal or a vertical position.

It follows, therefore, that a patentable novelty, if any exists, is restricted to the particular structure disclosed. What, then, is the novel structure?

In nearly all of the cited prior art structures, the keeper member has a curved post against which a portion of the level strikes when the door is swung. Pat-

entees (Claim 1) describe this portion of the keeper as "an outstanding post and a head at the outer portion of the post, said head depending below the post and formed with upper and lower outer sides coming substantially to a point." The keeper described in the Kiel patent is decidedly similar. The differences between appellees' lever latch and the prior art structures are more pronounced. Automatic operation is dependent upon the cooperation of the latch and the keeper. Consequently there naturally follow differences in the structural design of one member due to difference in structure of the other member. We repeat then that patentable novelty resides in the structural differences of the latches (either in the keeper member or the latch member or in both); that the claims are narrow and their validity is conceded. Our operation of the physical exhibits discloses a basis for the concession of validity. But it is this narrow field and nothing more which the inventor possessed when he secured his patent.

As thus analyzed, limited, and explained, are the claims infringed by appellant's latch?

Appellant's structure has a keeper and a latch member located similarly to the appellees'. But it contends that both its keeper and its latch member differ from those of the patent. Its keeper does not have (so it says) "an outstanding post and a head at the outer portion of the post, said head depending below the post and formed with upper and lower curved outer sides coming substantially to a point," nor does its latch lever have one "arm formed with an under cam side extending from the pivot and adapted to be engaged under the depending portion of the keeper." It supplies its keeper with a lug on the inner or door side and its latch lever is supplied with an arm extending from the pivot of the latch member, but such arm does not engage "the depending portion of the keeper." Rather is it so constructed and so angled as to come in contact with the lug on the head of the keeper. It is this contact between the lug and the arm on the latch which causes the latch to automatically swing and lock

when the door is slammed. Appellant's keeper, though supplied with "a head formed with upper and lower curved outer sides coming substantially to a point" does not, as in the patent in suit, make use of the curved upper sides to direct the movement of the latch when the door is shut. If the arm on its lever extended a little further it would contact with the upper curved outer side portion of the head of the keeper.

The precise question then is, does appellant avoid infringement by placing a lug on the near side of the head of its keeper, the surface of which is curved similarly to the outer surface of its head and which is adapted to contact with the arm projecting from the handled portion of its lever?

Concede the existence of claims that are narrow and restricted to structural design only, yet even in such claims there must be some range of equivalency.

Perhaps the expression "range of equivalency" is not a happy one nor does it describe the thought as accurately as it should. Instead, it would doubtless be better to say that a valid claim should rarely, if ever, have its language construed with absolute literacy. While a valid, narrow claim will be strictly construed, it by no means follows that its terms and expressions should be limited to a hard and fast, unbending definition. Rather must the language of each claim be defined in the light of the meaning given it by the patentee, with an appreciation of the purpose and object of the element in the patented structure. To illustrate. Patentee speaks of a keeper with its base, its post, and its head. The latter member is described as having "upper and lower curved outer sides coming substantially to a point." In our effort to ascertain whether infringement occurred, we must define the head as well as the "sides of the head." Is the outside of appellant's lug a part of the side of the head of the keeper? Certainly it is a part of the head and, in the light of the mechanics of the entire structure, the purpose it serves, we conclude that it is a part of the *side* of the head.

The decree is modified in so far as it sustains the validity of claims five and six of the patent in suit and enjoins the infringement of said claims five and six and to the extent that appellant is directed to account for its gains and profits due to the infringement of said claims five and six. Otherwise the decree is affirmed. The cost in this court shall be divided equally between the parties.

FILE COPY

NOV 4
CHARLES ELMOR

SUPREME COURT OF THE UNITED STATES

Nos. 4 and 14. October Term, 1929.

SANITARY REFRIGERATOR CO., *Petitioner*, v. ALEXANDER F. WINTERS and BASIL R. CRAMPTON, — On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

4

ALEXANDER F. WINTERS and BASIL R. CRAMPTON, *Petitioners*, v. DENT HARDWARE COMPANY. — On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

14

PETITION FOR REHEARING ON BEHALF OF SANITARY AND DENT COMPANIES.

Come now the above-named Sanitary Refrigerator Co., and Dent Hardware Company, and present this, their petition for a rehearing of the above-entitled cause and in support thereof respectfully show:

(1) That the Sanitary Refrigerator Co., in its petition for certiorari on page 7, after assigning error in finding infringement in respect of Winters and Crampton, claims 1, 2, 3, 4 and 7 prayed:

"That your petitioner may have such other and fur-

ther relief in the premises as the nature and circumstances of their case may require."

In a patent case where there is no dispute as to title, as here, ordinarily only two questions are involved:

(a) the validity of the claims in suit;

(b) their infringement.

Error was specifically assigned by the Sanitary Refrigerator Co., in finding infringement and under the general prayer quoted, *supra,* why may not the item of the validity of said claims be passed on?

(2) That said Sanitary Refrigerator Co. did not concede the validity of said Winters and Crampton claims except under such a construction that infringement was not present, and in its appeal to the Court of Appeals for the Seventh Circuit, said Sanitary Refrigerator Co. assigned as error:

"The Court erred in holding the Winters and Crampton patent No. 1,385,102 good and valid as to all the claims thereof (Sanitary R., p. 63)."

Further Sanitary Co., on page 5 of its main brief, paragraph 3, challenged the validity of the Winters & Crampton patent and fully argued this item on pages 13 to 23 of its brief.

(3) That in May, 1928, when said Sanitary Refrigerator Co. filed in this court its petition for certiorari, said Sanitary Refrigerator Co. could not challenge the opinion of the Circuit Court of Appeals for the Third Circuit in the Dent case as said opinion was not filed until October 4th, 1928. After said opinion of the Court of Appeals for the Third Circuit was filed said Sanitary Refrigerator Co. was required merely to call the attention of this Court to the conflict of decisions between the two Circuit Courts of Appeals as this was the only theory on which this Court would order the writ. The decision of the Circuit Court of Appeals for the Third Circuit being in favor of the Dent

Hardware Company and against Winters and Crampton, the petition for the writ of certiorari to the Circuit Court of Appeals for the Third Circuit was filed by Winters and Crampton. Sanitary and Dent did not participate in Winters & Crampton's petition for the writ to the Third Circuit. The Sanitary Refrigerator Co. assigned no error with respect to the Court of Appeals for the Third Circuit, as its opinion was in favor of the Dent Hardware Company.

Speaking with the utmost respect, the finding in the eleventh line of page 3 of the opinion does not seem to be entirely correct, as Sanitary's petition did not assign error in respect of any proceedings in the Third Circuit.

(4) By the declination to consider the invalidity of any of the claims of the Winters & Crampton patent and the holding in effect that all claims of the Winters & Crampton patent as claim 3 and others are valid, the grave and anomalous situation has been created, that any person manufacturing the construction of the Keil patent (Sanitary R., p. 88) (which expired in 1913, and has been public property for sixteen years) under the opinion (unless modified and amplified) might be held an infringer of claim 3 and others of the Winters & Crampton patent granted in 1921 (see pages 15 and 16 of brief for Sanitary and Dent), said claim 3 reading squarely on the Keil structure.

(5) Since that which will infringe if later will anticipate if earlier and

> "Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same even though they differ in name, form or shape."

it follows, by the same token, that the Keil patent is an anticipation of the Winters & Crampton patent, since it does the same work in substantially the same way and accomplishes substantially the same result. Hence the structures of Keil and Winters and Crampton are substan-

tially the same, even though they differ in name, form or shape.

(6) The language comparing the Winters & Crampton and Schrader structures (lines 3 to 8, page 8 of the opinion) is equally applicable to the structures of Keil and Winters and Crampton, to wit:

> "It has like it a keeper attached to the door casing with a triangular head, and a lever latch with a handle and two arms whose functions are to trip or give a kick to the latch lever by their coaction with the keeper head and wedge the lower arm under it, regardless of the position of the latch lever when the closing operation beings."

Your petitioner therefore prays this Honorable Court to order that the case be restored to the docket for re-argument, and thereafter, if it shall seem proper, to make such modification of the opinion and decree filed as justice and right may require.

ARGUMENT.

In presenting this petition for rehearing we are fully aware of the reluctance of this Court to rehear or reconsider questions once decided and appreciate the amount of thought and time the Court has already given to this case. We are convinced, however, that it is our duty not only to the Sanitary and Dent Companies but to this Court to ask it again to consider this case for the reasons hereinafter pointed out.

We, therefore, most respectfully urge upon the Court that it, and in justice to all concerned, will review and reverse or revise its ruling, as it did not hesitate to do, in *Tilghman v. Proctor,* 102 U. S. overruling *Mitchell v. Tilghman,* 19 Wallace, where an error had been made. The rehearing is asked on the sincere belief that an unusual and anomalous situation has arisen by reason of the Court assuming the validity of such claims of the Winters &

Crampton patent, as claims 3, and others, for the reason that certain of these claims, as claim 3, are squarely readable word for word on the Keil construction (Sanitary R., p. 88), and any party manufacturing the Keil fastener which has been public property since 1913 might under the opinion be held as an infringer of Winters & Crampton's claims, particularly claim 3, since that which will infringe if later will anticipate if earlier. The keeper of the Winters & Crampton patent merely acts to kick the latch or lever element irrespective of whether said lever stands vertical or horizontal. This is precisely the action of the keeper and lever of the Keil patent. It is humbly submitted that in view of the public interest, the case should be reheard and consideration given to the invalidity of the Winters & Crampton claims. The Court of Appeals for the Third Circuit said:

> "The same range of equivalency here contended for by the plaintiffs, so as to include the defendant's structure, would bring plaintiffs' patent within the prior art and invalidate it. It seems to us that the choice lies between holding the plaintiffs' patent invalid for want of patentable novelty over the prior art or holding it valid but limited to the particular structure disclosed which does not include the defendant's device within its range of equivalency" (page 53, Brief for Sanitary and Dent).

For the foregoing reasons it is respectfully urged that the petition for rehearing be granted to the extent of further considering the validity of Winters and Crampton's claim 3 and other claims, and that the decree of the Circuit Court of Appeals for the Third Circuit be upon further consideration affirmed.

Respectfully submitted,

E. HAYWARD FAIRBANKS,
Counsel for Sanitary and Dent Companies.

CERTIFICATE OF COUNSEL.

I, E. Hayward Fairbanks, counsel for the above-named Sanitary Refrigerator Co. and Dent Hardware Co., do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

E. HAYWARD FAIRBANKS,
Counsel for Sanitary Refrigerator Co. and Dent Hardware Co.

November, 1929.